**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Amendment of Parts 73 and 74 of the | ) | |
| Commission's Rules to Establish Rules for | ) | MB Docket No. 03-185 |
| Digital Low Power Television, Television | ) | |
| Translator, and Television Booster Stations and | ) | |
| to Amend Rules for Digital Class A Television | ) | |
| Stations | | |

## OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.429(f) of the Commission's rules, The Association of Public Television Stations ("APTS")[1] hereby submits its Opposition to a Petition for Clarification or Modification filed by the New America Foundation and the Champaign Urbana Wireless Internet Network in the above-captioned proceeding (the "Petition").[2] Although styled as a petition for clarification or modification, the underlying argument and request of New America's Petition amounts to a Petition for Reconsideration in fact. Because it does not conform to the requirements of a petition for reconsideration, and because the issues it raises are best addressed in the ongoing docket examining the introduction of unlicensed devices into the TV band (ET 04-186), this Petition should be denied.

[1] APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 357 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.

[2] Petition for Clarification or Modification, New America Foundation and Champaign Urbana Wireless Internet Network, MB Docket 03-185 (December 29, 2004). Notice of the petition was published in the Federal Register on February 15, 2005. 70 Fed. Reg. 7737 (Feb. 15, 2005).

## I. The Petition Seeks Extensive Revision to FCC Rules and Policies Duly and Appropriately Promulgated Through Notice and Comment Procedures

Although the Petitioners style their Petition as one for Clarification or Modification, the relief sought is nothing short of a wholesale revision of FCC rules established in this docket through proper notice and comment procedure. First, Petitioners claim, without substantiation, that the grant of second channels to low power and translator stations for digital operations would "reduce available spectrum for unlicensed devices to a nullity."[3] In fact, at worst, it would only delay the introduction of such devices until the end of the DTV transition, a policy result that APTS and a substantial number of parties in Docket 04-186 have supported.[4] Second, Petitioners complain that there is no clear date on which companion channels could be allocated, thus contributing further to the difficulty of manufacturers in developing unlicensed devices that could be used in the broadcast bands.[5]

Petitioner's concerns, however, are misplaced and irrelevant to this docket. That there might be less "vacant" spectrum available, or that manufacturers might have difficulty producing equipment, for a service that does not yet exist and that at present is extremely controversial, is no excuse for overturning a carefully thought-out and well-considered policy designed to preserve television service to rural Americans.

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[3] Petition, p. 2.

[4] See Comments of the Association of Public Television Stations, ET Docket 04-186, p. 1 (November 30, 2004).

[5] Id. Public Television also wishes there would be a clear date for introduction of companion channels so that rural Americans who receive their TV signals via translators can benefit from the enhanced noncommercial educational services that digital technology can offer. But Public Television agrees with the Commission that the channel election process for full-power stations must have significantly progressed first before translator service – which relies on the engineering of licensed facilities between allotted TV allocations— can be expanded.

In fact, Petitioners seek nothing less than subordinating a licensed broadcast service (albeit one that is secondary to primary licensed broadcast TV operations) to another service whose status is as of yet undetermined. In this regard, the Petitioners state: "[T]he Commission should clarify that any applicant for a companion channel must accept operation of unlicensed devices in the companion channel subject to the conditions of operation determined in 04-186."[6]

Not only is this incoherent, but it also belies the apparently "technical" nature of a Petition for "Clarification." What Petitioners seek is in fact to modify the rules for granting companion channels so that television translators must cede spectrum to unlicensed devices, even where the rules for such devices are not yet approved. If ever there was an example of overreaching, surely this is one, and it makes little sense. In fact, the reach of this request extends so far that it affects the basic policy choices underlying the final rules on translators and low power television stations adopted in this docket through notice and comment procedures.

## II. Petitioners Fail to Present Facts Warranting Reconsideration

As the Petitioners are well aware, a petition for reconsideration must prove any of the following:

> (1) The facts relied upon relate to the events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;
>
> (2) The facts relied on were unknown to the petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

[6] Petition, p. 3.

(3) The Commission determines that consideration of the facts relied on is required in the public interest.[7]

Petitioners apparently attempt to rely on the first factor above, as they claim that the Commission failed to consider two new relevant actions: its pending unlicensed devices proceeding at ET Docket 04-186 and its clarification in its Ultra-Wide Band proceeding, ET Docket 98-153.[8] Neither are of relevance to this proceeding and neither represent facts or changed circumstances that would warrant the kind of rule revision Petitioners desire.

First, the Commission has had ample opportunity to consider the impact of the rules adopted in this docket on its pending proceeding relating to the introduction of unlicensed devices in the TV band. The pending unlicensed devices proceeding at ET 04-186 was in fact initiated through a related Notice of Inquiry on December, 11, 2002. Eight months later (August 6, 2003), the Commission approved of the Notice of Proposed Rulemaking in the translator and low power proceeding. Nine months later, the Commission approved of its Notice of Proposed Rulemaking in ET 04-186 (May 13, 2004), and it has been considering the issues in that docket ever since. Only recently have final rules for the translator and low power service been approved (September 9, 2004).

While it is true that comments and replies, filed in response to the unlicensed devices NPRM occurred after the issuance of final translator and low power TV rules, it is undeniable that the Commission has had the benefit of numerous comments and replies in the unlicensed devices proceeding in response to the NOI --- all prior to the issuance of

[7] 47 C.F.R. § 1.429(b).

[8] Petition, p.1.

final rules in the translator and low power proceeding. Petitioners clearly had an opportunity to present their arguments to the Commission in this present docket – and in fact did so on numerous occasions, as did other parties[9]—prior to the issuance of the translator and low power proceeding, thus demonstrating that the facts relied upon in this Petition were clearly known by the petitioners and the Commission at the last opportunity Petitioners had to present them.[10] Accordingly, the Petition should be denied under the first two prongs of the standard for accepting a Petition for Reconsideration.

Second, the Petitioners attempt to argue that the Commission's latest decision in the Ultra-Wideband proceeding[11] somehow establishes that the Commission may "condition a grant of a licensed companion channel on acceptance of possible interference from Part 15 "unlicensed" devices."[12] Of course the Commission's decision in the Ultra-Wideband proceeding, while a new development, says no such thing. At issue in this decision was whether the Commission had authority to allow Part 15 unlicensed devices to operate in PCS and cell phone spectrum as long as no harmful

[9] See Letter from Michael Calabrese, New America Foundation, to Marlene Dortch, MB Docket 03-185 (September 8, 2004) (referencing email to Edmond Thomas); Letter from Michael Calabrese, New America Foundation, to Marlene Dortch, MB Docket 03-185 (September 8, 2004) (referencing email to Bryan Tramont); Email from Jim Snider, New America Foundation to Johanna Mikes and Barry Ohlson, MB Docket 03-185 (September 2, 2004); Email from Jim Snider, New America Foundation to Jordan Goldstein and Paul Margie, MB Docket 03-185 (September 2, 2004). See also Letter from Scott Blake Harris, Microsoft, to Marlene Dortch, MB Docket 02-185 (September 3, 2004) (referencing meeting with Bryan Tramont and Cheryl Wilkerson).

[10] 47 C.F.R. § 1.429(b).

[11] Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, Second Report and Order and Second Memorandum Opinion and Order, FCC 04-285 (December 15, 2004).

[12] Petition, p. 3.

interference to licensed operations were to occur.[13] The Commission reiterated its authority in this regard, arguing that its regulations concerning the manufacture, distribution and use of unlicensed devices, while not a licensing scheme per se, acts to manage the spectrum in a way that ensures licensed services are not subject to interference. At no point is there even the remotest suggestion that licensed services may be on par with unlicensed services or that the former could be subordinated to the latter. And, in fact, in defending its authority to authorize the operation of unlicensed devices on a non-interfering basis, the Commission surveyed Congressional pronouncements concerning unlicensed devices and found numerous instances where Congress authorized such devices but found no instance where such devices had primary status over licensed operations.[14] Therefore, for the reasons articulated above, the Petition should be denied.

## II. The Issues Raised by the Petition Are Best Examined in the Pending Docket Concerning Introduction of Unlicensed Device in the TV Band

In an apparent attempt to address the third prong of the standard for reconsideration, the balance of the Petition advances policy arguments for why the

[13] Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, Second Report and Order and Second Memorandum Opinion and Order, FCC 04-285, ¶ 71 (December 15, 2004) ("[A]lthough certain devices are unlicensed, they are still subject to appropriate regulation to ensure that they do not cause harmful interference to authorized users of the spectrum").

[14] Id at ¶¶ 73-74. Petitioners cite the Balanced Budget Act of 1997, Pub. L. 105-33, Section 3002(c)(1)(C)(v), but as the Commission correctly recognized, this provision relates to a band solely dedicated for use by unlicensed devices and does not imply that licensed operation could in any way be subordinate to unlicensed operation. "Section 3002(c) of the Balanced Budget Act of 1997, which directs the Commission to make additional spectrum available by auction, Congress acknowledged the Commission's unlicensed regulatory regime by expressly protecting those frequency bands that the Commission had already authorized for unlicensed use pursuant to Part 15." Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, Second Report and Order and Second Memorandum Opinion and Order, FCC 04-285, ¶ 74 (December 15, 2004).

introduction of unlicensed devices in the TV band would benefit the public without causing harmful interference to licensed TV operations. These issues are the subject of the pending proceeding at ET Docket 04-186 and have engendered considerable controversy. Accordingly, these issues are best examined not within the context of a petition for reconsideration but in the separate and ongoing unlicensed devices proceeding. For these reasons, the Petition should be denied.

## Conclusion

For the above reasons, Public Television urges the Commission to deny the Petition for Clarification or Modification submitted by the New America Foundation and the Champaign Urbana Wireless Internet Network.

Respectfully submitted,

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